

152
No. 698

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF,

Plaintiff in Error,

vs.

WELLS, FARGO & COMPANY (A
CORPORATION),

Defendant in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States,
of the Ninth Judicial Circuit, in and for the
Northern District of California.

FILED

MAY 29 1901

Proceedings of Council

Journal of Proceedings

Judgment . . . 157

INDEX.

	Page
Answer.....	10
Assignment of Errors.....	70
Bill of Exceptions and Statement of the Evidence.....	27
Bond on Writ of Error.....	79
Bond, Order Allowing Writ of Error and Fixing Amount of	78
Certificate to Judgment-roll.....	26
Certificate to Record on Writ of Error.....	82
Citation.....	86
Complaint.....	5
Cross-Complaint, Demurrer to.....	17
Decision.....	20
Decision.....	63
Defendant's Exhibit "A" (Certificate).....	58
Demurrer to Cross-Complaint.....	17
Demurrer to Cross-Complaint, Order Sustaining.....	18
Exhibit "A," Defendant's (Certificate).....	58
Exhibit No. 1, Plaintiff's (Letter from William Wolff & Co. to Colonel George E. Gray).....	32
Exhibit No. 2, Plaintiff's (Certificate).....	44
Judgment.....	24
Judgment-roll, Certificate to.....	26
Order Allowing Writ of Error and Fixing Amount of Bond	78
Order Allowing a Writ of Error, Petition of Defendant for an.....	69
Order Extending Time to File Transcript.....	1
Order Extending Time to File Transcript.....	2
Order Extending Time to File Transcript.....	3
Order Extending Time to File Transcript.....	4
Order Sustaining Demurrer to Cross-Complaint.....	18
Petition of Defendant for an Order Allowing a Writ of Error.....	69

	Page
Plaintiff's Exhibit No. 1 (Letter from William Wolff & Co. to Colonel George E. Gray).....	32
Plaintiff's Exhibit No. 2 (Certificate).....	44
Statement of the Evidence and Bill of Exceptions.....	27
Stipulation Waiving Jury.....	19
Summons.....	8
Testimony on Behalf of Defendant:	
Edmund Baker.....	51
Edmund Baker (cross-examination).....	59
Martin Boze.....	47
Martin Boze (cross-examination).....	47
George W. Percy (recalled).....	50
William Wolff.....	47
William Wolff (cross-examination).....	50
Testimony on Behalf of Plaintiff:	
J. Y. Ayer.....	40
J. Y. Ayer (cross-examination).....	42
Henry C. George.....	42
Henry C. George (cross-examination).....	42
Henry C. George (redirect examination).....	43
Henry C. George (recross-examination).....	43
Henry C. George (recalled).....	46
George E. Gray.....	28
George E. Gray (cross-examination).....	34
George E. Gray (redirect-examination).....	38
George W. Percy.....	44
George W. Percy (cross-examination).....	45
George W. Percy (redirect examination).....	46
Writ of Error.....	83
Writ of Error and Fixing Amount of Bond, Order Allow- ing.....	78
Writ of Error, Bond on.....	79
Writ of Error, Certificate to Record on.....	82
Writ of Error, Petition of Defendant for an Order Allow- ing.....	69

*In the United States Circuit Court of Appeals for the Ninth
Circuit.*

WILLIAM WOLFF,
Plaintiff in Error,)
vs.)
WELLS, FARGO & COMPANY (a Cor-)
poration),)
Defendant in Error.)

Order Extending Time to File Transcript.

Good cause being shown therefor, it is ordered that the plaintiff in error in the above-entitled cause do have thirty (30) days from and after the 19th day of January, 1901, within which to file and docket his transcript of the record on the writ of error herein, and the time to file and docket such transcript is hereby enlarged thirty (30) days from and after said 19th day of January, 1901.

Dated San Francisco, January 17, 1901.

WM. W. MORROW,
Judge of the Circuit Court of Appeals.

[Endorsed]: No. 698. Circuit Court of Appeals, Ninth Circuit. William Wolff, Plaintiff in Error, vs. Wells, Fargo and Company (a Corporation). Defendant in Error. Order Enlarging Time to File Transcript. Filed January 17, 1901. F. D. Monckton, Clerk. Vogelsang & Brown, Attorneys for Plff. in Error, Mills Building, 7th Floor, San Francisco, Cal.

*In the United States Circuit Court of Appeals for the Ninth
Circuit.*

WILLIAM WOLFF,

Plaintiff in Error,

vs.

WELLS, FARGO & COMPANY (a Cor-
poration),

Defendant in Error.

Order Extending Time to File Transcript.

Good cause being shown therefor, it is ordered that the plaintiff in error in the above-entitled cause do have thirty (30) days from and after the 15th day of February, 1901, within which to file and docket his transcript of the record on the writ of error herein, and the time to file and docket such transcript is hereby enlarged thirty (30) days from and after said 15th day of February, 1901.

Dated San Francisco, February, 15, 1901.

WM. W. MORROW,

Judge of the Circuit Court of Appeals.

[Endorsed]: No. 698. Circuit Court of Appeals. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Company (a Corporation), Defendant in Error. Order Enlarging Time to File Transcript. Filed Feb. 15, 1901. F. D. Monclton, Clerk. Vogelsang & Brown, Attorneys for Plaintiff in Error, Mills Building, 7th Floor, San Francisco, Cal.

*In the United States Circuit Court of Appeals for the Ninth
Circuit.*

WILLIAM WOLFF,

Plaintiff in Error,

vs.

WELLS, FARGO & COMPANY (a Cor-
poration).

Defendant in Error.

Order Extending Time to File Transcript.

Good cause being shown therefor, it is ordered that the plaintiff in error in the above-entitled cause do have thirty (30) days from and after the 18th day of March, 1901, within which to file and docket his transcript of the record on the writ of error herein, and the time to file and docket such transcript is hereby enlarged thirty (30) days from and after said 18th day of March, 1901.

Dated San Francisco, March 18, 1901.

WM. W. MORROW,

Judge of the Circuit Court of Appeals.

[Endorsed]: No. 698. Circuit Court of Appeals. Ninth Circuit. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Co. (a Corporation), Defendant in Error. Order Enlarging Time to File Transcript. Filed March 18, 1901. Frank D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk. Vogelsang & Brown, Attys. for Plaintiff in Error. Mills Bldg., 7th Floor, San Francisco, Cal.

*In the United States Circuit Court of Appeals for the Ninth
Circuit.*

WILLIAM WOLFF,

Plaintiff in Error,

vs.

WELLS, FARGO & COMPANY,

Defendant in Error.

Order Extending Time to File Transcript.

Good cause being shown therefor, it is ordered that the plaintiff in error in the above-entitled cause do have thirty days from and after the 17th day of April, 1901, within which to file and serve his transcript of the record herein, and the time for filing and service of said transcript is hereby enlarged for thirty days from and after said 17th day of April, 1901.

Dated San Francisco, this 17th day of April, 1901.

WM. W. MORROW,

Judge of the Circuit Court of Appeals.

[Endorsed]: No. 698. United States Circuit Court of Appeals Ninth Circuit. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Co., Defendant in Error. Order Enlarging Time Within Which to File Transcript of Record. Filed April 17, 1901. F. D. Monckton, Clerk. Vogelsang & Brown, Attorneys for Mills Building, 7th Floor, San Francisco, Cal.

*In the Circuit Court of the United States, Ninth Circuit, and
Northern District of California.*

WELLS, FARGO & COMPANY (a Cor- poration),	} Plaintiff,
vs.	
WILLIAM WOLFF,	} Defendant.

Complaint.

Plaintiff herein complains of the above-named defendant and for cause of action alleges:

I.

That at all the times hereinafter mentioned plaintiff was and now is a corporation organized and existing under the laws of Colorado, and is a citizen and resident of the State of Colorado.

II.

That the defendant is a citizen of the State of California and a resident of the Northern District of the said State of California, and is engaged in doing business under the name of William Wolff & Co., in the city and county of San Francisco, in said State of California.

III.

That the plaintiff has constructed a building in the said city and county of San Francisco.

IV.

That heretofore, to wit, on or about the 24th day of September, 1897, and prior to the construction of said building, the defendant agreed to sell to the plaintiff as much Alsen's German Portland Cement as the plaintiff should require for use in the construction of said building, said cement to be furnished at the rate of \$2.56 per barrel.

V.

That the plaintiff has required and has been compelled to use 7,925 barrels of said cement in the construction of said building, and that, pursuant to the terms of said agreement, the defendant sold and delivered to the plaintiff 5,000 barrels of said cement, and no more, and though often requested by the plaintiff to sell to it, in addition to the said 5,000 barrels, 2,925 barrels of said cement, at the said rate of \$2.56 per barrel, for use in the construction of said building, the defendant wholly failed and neglected and refused to sell to the plaintiff any more than said 5,000 barrels of said cement at the said rate of \$2.56 per barrel, or at any less rate, and that the plaintiff has been ready and willing to receive said 2,925 barrels of said cement and to pay for the same at the said rate of \$2.56 per barrel.

VI.

That by reason of the said failure, neglect and refusal of said defendant to furnish said 2,925 barrels of said cement to the plaintiff at the said rate of \$2.56 per barrel, the plaintiff at the said rate of \$2.56 per barrel, the plaintiff has been damaged in the sum of two thousand

eight hundred and seventy-six dollars (\$2,876), no part of which has been paid.

Wherefore, said plaintiff prays judgment against the defendant for the sum of two thousand eight hundred and seventy-six dollars (\$2,876), with interest thereon at the rate of seven per cent per annum, and for its costs of suit.

E. S. PILLSBURY,

Attorney for Plaintiff.

State of California,
Northern District of California,
City and County of San Francisco. } ss.

Aaron Stein, having been first duly sworn, says on oath: I am an officer, to wit, the secretary of Wells, Fargo and Company, a corporation, the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true, except as to those matters which are therein stated on the information and belief of the said corporation, and as to those matters I believe it to be true.

AARON STEIN.

Subscribed and sworn to before me this 29th day of November, 1898.

[Seal]

A. J. HENRY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed November 29, 1898. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit, Northern
District of California.*

WELLS, FARGO & COMPANY (a Cor-
poration),

Plaintiff,

vs.

WILLIAM WOLFF,

Defendant.

Summons.

Action brought in the said Circuit Court, and the complaint filed in the office of the clerk of said Circuit Court, in the city and county of San Francisco.

The President of the United States of America, Greeting, to William Wolff, Defendant:

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

You are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER,
Chief Justice of the United States, this 6th day of March,
in the year of our Lord one thousand eight hundred and
ninety-nine, and of our independence the one hundred
and twenty-third.

[Seal]

SOUTHARD HOFFMAN,
Clerk.

[Endorsed]:

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the
6th day of March, 1899, and personally served the same
on the 6th day of March, 1899, upon William Wolff, by
delivering to, and leaving with William Wolff, said de-
fendant named therein, personally, at the city and county
of San Francisco, in said District, a certified copy there-
of, together with a copy of the complaint, certified to by
plaintiff's attorney.

San Francisco, March 6th, 1899.

JOHN H. SHINE,
United States Marshal.
By J. A. Littlefield,
Office Deputy.

Filed March 7, 1899. Southard Hoffman, Clerk. By
W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

WELLS, FARGO AND COMPANY (a
Corporation).

Plaintiff,

vs.

WILLIAM WOLFF,

Defendant.

Answer.

Now, comes the defendant, above named, and in answer to the complaint of plaintiff on file herein, admits, denies and alleges as follows, to wit:

I.

Said defendant admits the allegations set forth in paragraphs one (1), two (2), and three (3) of said complaint.

II.

Defendant denies that on or about the 24th day of September, 1897, or prior to the construction of said building mentioned in said complaint, or at any time or at all, said defendant agreed to sell to plaintiff as much Alsen's German Portland Cement, or any other cement, as the plaintiff should require for use in the construction of said building, or otherwise, at the rate of two and 56-100 dollars (\$2.56) per barrel. And in that behalf defendant al-

leges the fact to be that on or about the 24th day of September, 1897, and prior to the construction of said building, defendant and plaintiff contracted for the price of two and 56-100 dollars (\$2.56) per barrel on five thousand (5000) barrels of said cement delivered at the building site of said building in the city and county of San Francisco; and thereupon and thereafter, and before the commencement of this action, defendant did deliver said five thousand (5,000) barrels at the rate of two and 56-100 dollars (\$2.56) per barrel at said building site, and on his part performed all the terms and conditions of said contract.

III.

Defendant has no information nor belief sufficient to enable him to answer the allegation that plaintiff has required and has been compelled to use seven thousand nine hundred and twenty-five (7,925) barrels of said cement, or any number of barrels in excess of five thousand (5,000) barrels in the construction of said building, and therefor, and on that ground, defendant denies that plaintiff has been compelled to use seven thousand nine hundred and twenty-five (7,295) barrels if said cement or any number in excess of five thousand (5,000) barrels in the construction of said building. Said defendant denies that plaintiff requested him to sell to it, in addition to the said five thousand (5,000) barrels, two thousand nine hundred and twenty-five (2,925) barrels of said cement at the said rate of two and 56-100 dollars (\$2.56) per barrel for use in the construction of said building, or other-

wise, or at all; but defendant admits that plaintiff did request him to sell to it more barrels of said cement than the aforesaid five thousand (5,000) barrels for use in the construction of said building at the rate of two and 56-100 dollars (§2.56) per barrel; and thereupon defendant was ready and willing to sell plaintiff said cement in excess of said five thousand (5,000) barrels at the current market rate, but said plaintiff refused to receive any of said cement from defendant in excess of said five thousand (5,000) barrels at the current market rate, which said current market rate was in excess of two and 56-100 dollars (§2.56) per barrel.

IV.

Defendant has no information nor belief sufficient to enable him to answer the allegation of plaintiff that by reason of the failure, neglect, and refusal of defendant to furnish said two thousand nine hundred and twenty-five (2,925), or any barrels, of said cement to plaintiff at the said rate of two and 56-100 dollars (§2.56) per barrel, plaintiff has been damaged in the sum of two thousand eight hundred and seventy-six (§2,876) dollars; therefore, and on that ground, defendant denies that by any failure or neglect or refusal on his part to furnish said two thousand nine hundred and twenty-five (2,925) barrels or any number of barrels of said cement, or any cement to plaintiff at the said rate of two and 56-100 dollars (§2.56) per barrel, or at any rate or at all, the plaintiff has been damaged in the sum of two thousand eight hundred and seventy-six (§2,876) dollars, or in any sum whatever.

And further answering said complaint, by way of counterclaim* thereto, said defendant alleges:

I.

That at all the times hereinafter mentioned, plaintiff was, and now is, a corporation organized and existing under the laws of Colorado, and is a citizen and resident of the State of Colorado.

II.

Defendant is a citizen of the State of California and a resident of the Northern District of the said State of California, and is engaged in doing business under the name of William Wolff and Company, in the city and county of San Francisco, said State.

III.

At the time of the commencement of this action, plaintiff has constructed a building in the city and county of San Francisco.

IV.

Heretofore, on, to wit the 24th day of September, 1897, plaintiff contracted to purchase of said defendant, and said defendant contracted to sell plaintiff at the rate of two and 56-100 dollars (\$2.56) per barrel at the site of the aforesaid building in the city and county of San Francisco, five thousand (5,000) barrels of Aisen's German Portland Cement; that thereupon, pursuant to said contract, said defendant sold and delivered, and said plaintiff purchased, said five thousand (5,000) barrels of said

*Amd. by Ord. Court, Oct. 16, 1899, W. B. B., Dep. Clk.

cement at the rate of two and 56-100 dollars (\$2.56) per barrel, and said plaintiff, before the commencement of this action, became indebted to defendant therefor in the sum of twelve thousand eight hundred (\$12,800) dollars in United States gold coin. That no part thereof has been paid, saving and excepting the sum of ten thousand five hundred and thirty-four and 40-100 dollars (\$10,534.40) on account thereof; and at the time of the commencement of this action there was, and still is, due and payable to the said defendant on account of said contract, the sum of two thousand two hundred and sixty-five and 60-100 dollars (\$2,265.60).

And further answering said complaint, and as a separate, second and distinct counterclaim* thereto, said defendant alleges:

I.

That at all the times hereinafter mentioned plaintiff was, and now is, a corporation organized and existing under the laws of Colorado, and is a citizen and resident of the State of Colorado.

II.

Defendant is a citizen of the State of California and a resident of the Northern District of the said State of California, and is engaged in doing business under the name of William Wolff and Company in the city and county of San Francisco, said State.

*Amd. by Ord. of Court, Oct. 16, 1899. W. B. B., Dep. Clk.

III.

Heretofore, within one (1) year last past, and before the commencement of this action, said plaintiff became indebted to plaintiff in the sum of two thousand two hundred and sixty-five and 60-100 dollars (\$2,265.60) on account of eight hundred and eighty-five (885) barrels of Alsen's German Portland Cement, sold and delivered by said defendant to plaintiff in the city and county of San Francisco, at the special instance and request of said plaintiff.

IV.

No part of said sum of two thousand two hundred and sixty-five and 60-100 dollars (\$2,265.60) has been paid, and at the time of the commencement of this action there was, and still is, due and payable therefor from said plaintiff to said defendant the sum of two thousand two hundred and sixty-five and 60-100 dollars (\$2,265.60) United States gold coin.

Wherefore, said defendant prays that said plaintiff recover nothing in this action; and that said defendant do have judgment against plaintiff for the sum of two thousand two hundred and sixty-five and 60-100 dollars (\$2,265.60), with interest thereon at the rate of seven (7 per cent) per cent per annum from June 1st, 1898, and for costs of suit.

VOGELSANG & BROWN,
Attorneys for Defendant.

United States of America,
 State of California,
 City and County of San Francisco. } ss.

William Wolff, being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer and well knows the contents thereof. That the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters that he believes it to be true.

WILLIAM WOLFF.

Subscribed and sworn to before me this 3d day of April, 1899.

[Seal]

EUGENE W. LEVY,
 Notary Public.

Service of within answer admitted this seventh day of April, 1899.

E. S. PILLSBURY,
 Atty. for Plff.

Filed April 7th, 1899. Southard Hoffman, Clerk.

*In the Circuit Court of the United States, Ninth Circuit, and
Northern District of California.*

WELLS, FARGO AND COMPANY (a Corporation),	Plaintiff,	} No. 12,711.
vs.		
WILLIAM WOLFF,	Defendant.	

Demurrer to Cross-Complaint.

Now, comes the plaintiff and demurs to the first count of the cross-complaint of the defendant herein, on the ground that said first count does not state facts sufficient to constitute a cause of action for a cross-complaint.

The plaintiff demurs to the second count of the cross-complaint of the defendant herein, on the ground that said second count does not state facts sufficient to constitute a cause of action for a cross-complaint.

E. S. PILLSBURY,

Attorney for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

E. S. PILLSBURY,

Attorney for Defendant.

[Endorsed]: Service of within demurrer admitted this 29th day of August, 1899.

VOGELSANG & BROWN,

Attys. for Deft.

Filed August 29th, 1899. Southard Hoffman, Clerk.

At a stated term, to wit, the July term, A. D. 1899, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco on Monday, the 16th day of October, in the year of our Lord one thousand eight hundred and ninety-nine. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

WELLS, FARGO & CO. }

vs. }

WILLIAM WOLFF. }

No. 12,711.

Order Sustaining Demurrer to Cross-Complaint.

By consent of counsel, it was ordered that demurrer to the cross-complaint herein be, and it hereby is, sustained; that defendant be and hereby is, allowed to amend cross-complaint upon its face, and that plaintiff be, and hereby is, allowed ten days to demur thereto.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

WELLS, FARGO AND COMPANY (a Corporation),	} Plaintiff,
vs.	
WILLIAM WOLFF,	

Stipulation Waiving Jury.

It is hereby stipulated by and between the parties to the above-entitled action that a jury in the said action be, and the same is, hereby waived, and that the said action may be tried by the Court sitting without a jury.

Dated San Francisco, November 7, 1900.

E. S. PILLSBURY,

Attorney for Plaintiff.

VOGELSANG & BROWN,

Attorneys for Defendant.

[Endorsed]: Filed November 8th, 1900. Southard Hoffman, Clerk.

*In the Circuit Court of the United States, Ninth Circuit, and
Northern District of California.*

WELLS, FARGO AND COMPANY (a Corporation),	} Plaintiff,	No. 12,711.
vs.		
WILLIAM WOLFF,	} Defendant.	

Decision.

This cause came on regularly for trial on the 13th, 14th and 15th days of November, 1900, before the Court sitting without a jury, a jury having been expressly waived by written stipulation of the parties duly signed and filed, Mr. E. S. Pillsbury and Mr. Alfred Sutro appearing for the plaintiff and Mr. Alex. T. Vogelsang and Mr. I. I. Brown appearing for the defendant. Evidence, both oral and documentary, was introduced, and certain admissions of fact were made by and on behalf of the respective parties, and thereupon the cause was submitted to the Court for its decision, and now the Court being fully advised in the premises, and after having fully considered the said evidence and the said admissions, makes the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT.

I.

On or about the 24th day of September, 1897, the defendant, at the city and county of San Francisco, State of California, contracted to sell to the plaintiff as much Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building which the plaintiff was at that time about to erect in the said city and county of San Francisco, at the rate of \$2.56 per barrel. The amount of cement so contracted to be sold was not restricted to any particular number of barrels. It is not true that at said time the defendant and the plaintiff contracted for the sale of five thousand (5,000) barrels of said cement delivered at the building site of said building in the said city and county of San Francisco for the price of two and 56-100 dollars (\$2.56) per barrel. It is not true that the defendant on his part performed all of the terms and conditions of the contract which the Court finds was made with the plaintiff for the sale of said cement.

II.

That plaintiff was required and was compelled to use seven thousand nine hundred and twenty-five (7,925) barrels of cement in the construction of said building.

III.

The defendant delivered to the plaintiff, for use in the construction of said building at the site of said building, five thousand barrels of Alsen's German Portland Cement

at \$2.56 per barrel. The plaintiff required and was compelled to use in the construction of said building 2,925 barrels of cement in addition to the said 5,000 barrels delivered to it by the defendant. The plaintiff requested the defendant to deliver to it the cement which it was so required and compelled to use in excess of said 5,000 barrels, at the said rate of \$2.56 per barrel, for use in the construction of said building, pursuant to the terms of said contract, but the defendant wholly failed, neglected, and refused to deliver to the plaintiff any more than the said 5,000 barrels under said contract.

IV.

By reason of the failure, neglect, and refusal of the defendant to furnish or deliver said 2,925 barrels of cement to the plaintiff, the plaintiff has been damaged in the sum of \$2,876, without interest.

V.

With respect to the issues made by the allegations of the first counterclaim set up in the answer of the defendant, the Court finds that the allegations of paragraphs I, II, and III thereof, are true. It is not true that on the 24th day of September, 1897, the plaintiff contracted to purchase of the defendant, and the defendant contracted to sell to the plaintiff, at the rate of two and 56-100 dollars (\$2.56) per barrel, at the site of the said building of the plaintiff in the said city and county of San Francisco, five thousand (5,000) barrels of Alsen's German Portland Cement, but in this behalf the Court finds the fact to be as in finding I hereof stated. It is true that pursuant to the terms of the contract in finding I

hereof stated to have been made between the plaintiff and the defendant, but not otherwise, the defendant sold and delivered, and the plaintiff purchased, five thousand (5,000) barrels of said cement at the rate of two and 56-100 dollars (§2.56) per barrel, and the plaintiff, before the commencement of this action, became indebted to the defendant therefor in the sum of \$12,800 in United States gold coin. Of said sum of \$12,800 no part has been paid saving and excepting the sum of \$10,534.40 on account thereof, and there is due and payable to the defendant from the plaintiff for said cement so sold and delivered the sum of \$2,265.60, without interest.

VI.

With respect to the issues made by the allegations of the second countclaim set up in the answer of the defendant, the Court finds that the plaintiff is indebted to the defendant in the sum of \$2,265.60, as in finding V hereof stated, for 885 barrels of Alsen's German Portland Cement sold and delivered by the defendant to the plaintiff, and being a part of the 5,000 barrels in findings III and V hereof stated to have been sold and delivered by the defendant to the plaintiff.

And from the foregoing facts the Court finds the following

CONCLUSIONS OF LAW.

The plaintiff is entitled to judgment against the defendant for the sum of \$2,876, less the sum of \$2,265.60—

that is to say, the plaintiff is entitled to judgment against the defendant for the sum of \$610.40, and for its costs.

San Francisco, November 20, 1900.

WM. W. MORROW,
Judge.

[Endorsed]: Filed November 20th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

WELLS, FARGO AND COMPANY (a Corporation),	} Plaintiff,	} No. 12,711.
vs.		
WILLIAM WOLFF,	} Defendant.	

Judgment.

This cause having come on regularly for trial upon the 13th day of November, 1900, being a day in the November, 1900, term of said court, before the Court sitting without a jury, a trial by jury having been waived by stipulation of the attorneys for the respective parties duly filed. E. S. Pillsbury and Alfred Sutro, Esqs., appeared on behalf of the plaintiff, and Alex. T. Vogelsang and I. I. Brown, Esqs., appeared on behalf of the defendant. Thereupon, the trial having been proceeded with on the 14th and 15th days of November in said year and term,

and the evidence, oral and documentary, upon behalf of the respective parties having been introduced, the cause was, after the arguments of the attorneys for the respective parties, submitted to the Court for consideration and decision.

And the Court, after due deliberation, having filed its findings in writing, and ordered that judgment be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Wells, Fargo and Company, a corporation, plaintiff, do have and recover of and from William Wolff, defendant, the sum of six hundred and ten and 40-100 (\$610.40) dollars, together with its costs in this behalf expended, taxed at \$46.80.

Judgment entered November 20, 1900.

SOUTHARD HOFFMAN,
Clerk.

A true copy. Attest:

[Seal]

SOUTHARD HOFFMAN,
Clerk.

By W. B. Beazley,
Deputy Clerk.

[Endorsed]: Filed November 20, 1900. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

WELLS, FARGO & COMPANY (a Corporation),

Plaintiff, } No. 12,711.

vs.

WILLIAM WOLFF.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 20th day of November, 1900.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By W. B. Beazley,

Deputy Clerk.

[Endorsed]: Judgment-roll. Filed November 20, 1900.
Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

WELLS, FARGO & COMPANY (a Cor-
poration),

Plaintiff,

vs.

WILLIAM WOLFF,

Defendant.

No. 12,711.

Bill of Exceptions and Statement of the Evidence.

The above-entitled cause was brought to recover damages for an alleged breach of contract, claimed to have been entered into by and between plaintiff and the defendant at San Francisco, on or about the 24th day of September, 1897. Plaintiff alleged that under said contract defendant agreed to sell to it as much of Alsen's German Portland Cement as the plaintiff should require for use in the construction of a certain building; said cement to be furnished at the rate of two and 56-100 dollars (\$2.56) per barrel. The plaintiff further alleged that it had required and had been compelled to use 7,925 barrels of said cement in the construction of said building. That the defendant sold and delivered to the plaintiff 5,000 barrels of said cement, and no more, and that though often requested thereto by the plaintiff defendant wholly failed and refused to sell to plaintiff any more than said 5,000 barrels at two and 56-100 dollars (\$2.56)

per barrel, or at any less rate, and alleged further that by reason of this failure and refusal plaintiff had been damaged in the sum of two thousand eight hundred and seventy-six dollars (\$2,876), for which amount it prayed judgment.

Defendant denied the allegations of the complaint and set forth a counterclaim, praying for judgment against said plaintiff for the sum of two thousand two hundred and sixty-five and 60-100 dollars (\$2,265.60), the price of eight hundred and eighty-five (885) barrels of said Alsen's German Portland Cement, at the rate of two and 56-100 (\$2.56) per barrel.

The case came on regularly for trial on the 13th day of November, 1900, before the Hon. W. W. Morrow, Circuit Judge. E. S. Pillsbury and Alfred Sutro, Esqs., appearing as counsel for the plaintiff, and Alex. T. Vogelsang and I. I. Brown as counsel for defendant.

A jury was expressly waived by written stipulation of the parties, duly signed and filed; thereupon the following proceedings were had and testimony taken.

An opening statement to the Court was made by E. S. Pillsbury, Esq.

GEORGE E. GRAY, a witness called on behalf of plaintiff, testified as follows:

I am a director and first vice-president of Wells, Fargo & Company, and occupied that position in the year 1897, when we contemplated the construction of a building in San Francisco. We commenced the construction of that building, located on the corner of Second and Mission streets in this city, in that year, and completed it along

in 1898. I have seen the defendant, Mr. William Wolff, and have talked with Mr. Baker, the representative of Wolff & Company, in regard to Alsen's German Portland Cement to be used as material in the construction of that building. I recollect a conversation with Mr. Baker.

Q. State what your conversation was with Mr. Baker.

Mr. BROWN.—We would like to interpose an objection first.

The COURT.—I suppose you will connect Mr. Baker with the defendant?

Mr. PILLSBURY.—Oh, yes, your Honor.

Mr. BROWN.—It is not for that reason. There is a preliminary question that I would like to ask the gentleman, and that is if there was a contract in writing in reference to this matter; if so, it might be that the writing, when produced, would be so clear that it would state the contract itself, and all prior negotiations would naturally be merged in it. That is why I object at this time, for the purpose of finding out what the fact is in that respect.

Mr. PILLSBURY.—We are leading up to that, your Honor. I will state that we expect to show that Colonel Gray had a conversation with a representative of this house; that pursuant to that conversation, the defendant, or Mr. Baker as his representative, wrote a letter to the plaintiff, or to Mr. Gray, as its representative, and acting upon that letter, Wells, Fargo & Company gave notice to the defendant to furnish the materials, and that materials were actually furnished pursuant to it, and paid for up to the limit of five thousand (5,000) barrels.

The COURT.—Then the contract would be based upon this letter?

Mr. PILLSBURY.—No. We say the contract is made up of the conversation and the letter. The letter refers to the conversation. It begins, "Referring to our recent conversation."

Mr. BROWN.—We will have to have the letter before the Court before we can tell.

The COURT.—We will see what it is. Mr. Pillsbury says he is leading up to it. Of course, if it is not, the Court will strike out whatever is not proper.

Mr. BROWN.—Then we will have the right to move to strike it out and we make that reservation.

The COURT.—Yes, the objection will be overruled.

Mr. BROWN.—We note an exception, and thereupon said exception to the ruling of the Court, permitting said question to be answered was allowed. (Defendants' Exception No. 1.)

(The witness, in answer to the last question, said:) It was substantially this: The question Mr. Baker desired was, that I would define accurately, some number of barrels of cement that we would want. I said to him, "I can't give you that because the architect tells me it is an uncertain quantity." The architect said to me, "I can't give it to you definitely." I told Mr. Baker what the architect said. I told him I wanted his proposition for the cement for that building, and I could not give him a positive quantity; that the architect said that un-

der certain conditions, he would require about five thousand (5,000) barrels. That is what I told Mr. Baker; that if certain other conditions existed, it would be a great deal more. On that statement to Mr. Baker, he left my office and went back to the office on Market street, as he said, and came back to me again with a written proposition which is embodied in this letter, which I recognize, and that is the letter that was received.

Q. Before offering that, Coloney Gray, I will ask you what, if anything, you told Mr. Baker, preliminarily, you contemplated doing with reference to a building, and why you were getting these bids.

Mr. BROWN.—We object, if your Honor please, to that question, for the reason that all these prior negotiations were merged in the writing. It now appears that there was a writing which was produced by Mr. Baker and given to Mr. Gray.

Mr. PILLSBURY.—No, I am simply getting at the full conversation.

Mr. BROWN.—It may be that the letter will speak for itself, and that the conversations and all prior negotiations were merged in it. Until it is in evidence, I cannot see how this can be permitted.

The COURT.—The Court has already determined that we will have the conversation leading up to the letter. Mr. Pillsbury has asked for all the conversation, and I think we shall have to take it all now.

Thereupon, the Court overruled the objection of the defendant to the question, to which the defendant excepted,

which exception was then and there allowed. (Defendant's Exception No. 2.)

(The witness continuing in answer to the question allowed, stated:) I told Mr. Baker my object was to get cement for the building, the total amount of cement we required.

The letter referred to by the witness and identified by him was then introduced in evidence and marked "Plaintiff's Exhibit No. 1," and was read to the Court. The following is a copy thereof, to wit:

Plaintiff's Exhibit No. 1.

"ALSEN'S PORTLAND CEMENT WAREHOUSE,
"Manufacturers of Portland Cement. William Wolff &
Co., California Agent, 329 Market Street, San Francisco."

(This constituted the letter head. And the body of the letter reads:)

"San Francisco, California, September 24, 1897.
Colonel Geo. E. Gray, 1st Vice-President Wells, Fargo &
Co., City.

Dear Sir: Referring to the conversation the writer Mr. Baker had with you this afternoon, we take pleasure in submitting to you our quotation on Alsen's German Portland Cement for use in the new Wells, Fargo Building now in course of construction.

We will name you a price for what you may require, on about five thousand barrels (5,000) more or less, of two dollars and fifty-six cents (\$2.56) per barrel delivered

at the building site Second & Mission Sts. in quantities to be designated by you.

We will guarantee the Alsen Cement to be of standard quality and subject to any reasonable tests you may call for.

Very respectfully,
(Signed) WILLIAM WOLFF & CO.,
Per EDMUND BAKER."

Thereupon, Mr. Brown, for the defendant, made the following motion to strike out, stating: So long as the letter is now in evidence, and for the purpose of saving the point, we will make the motion to strike out all the conversations prior to the letter, basing the motion upon this ground, that the writing is clear and unambiguous and speaks for itself, and all prior negotiations and conversations must be deemed to be merged in the writing, and that the conversations are therefore immaterial. There is no ambiguity calling for parol testimony, and it modifies and changes the said written agreement.

Said motion to strike out was then and there, by the Court, denied, to which ruling the defendant excepted, which exception was then and there allowed. (Defendant's Exception No. 3.)

(The witness thereupon continued:) After receiving this letter, I promptly advised Mr. Baker, verbally, that we would accept his proposition. My next step was to advise the architect that I had made this arrangement with Mr. Baker for the cement for the building. I advised him of my having contracted, bargained with these

people for the cement. Wolff & Company furnished the cement as we requested from time to time, in quantities as requested, until they had furnished 5,000 barrels. At the time that they declined to furnish more than 5,000 barrels, I did not know definitely, except by common report, that the price of cement had advanced. I had no conversation with Mr. Wolff, or any of the parties, until they came and demanded of me payment for a certain installment of cement, that made the last installment of the 5,000 barrels. They came to me to approve of the payment, and I declined to make the approval, as, I said, I stood upon the contract. They said they had fulfilled their contract. I differed with them and I declined to make the payment. They did not furnish any more than 5,000 barrels under this arrangement. We required more than 5,000 barrels for the construction of the building, to the extent of some 2,900 barrels. I think 2,925 was the number. I had to buy that extra 2,925 barrels in the open market, and had to pay more for it than the price mentioned in that letter, namely: Two and 56-100 dollars (\$2.56) per barrel. I paid \$3.55 per barrel for 2,818 barrels, and \$3.30 per barrel for 107 barrels, purchasing the same in this city from Henry Cowell. My impressions are that that was cheaper than I could buy from any other dealer in this city, which was the nearest place where it could be obtained.

On cross-examination, the witness testified:

On the day that Mr. Baker first came into my office, he introduced the subject of his desire to furnish our company with cement, and he expressed a desire to fur-

nish me with cement. He asked me how much I would need. He desired me to specially name a particular quantity, and I said to him I could not give him a particular quantity. As I said before, I told him that under certain conditions, we would require at least 5,000 barrels, and I said to him that under certain conditions, we might require even less than 5,000 barrels. I do not remember saying in that conversation that it was possible that we would require but 3,000 barrels. I have no recollection whatever of that number being mentioned. If a certain form of construction we had in mind had been adopted, 3,000 barrels of cement would not have been sufficient and not near it. I suppose it was very, very close upon 5,000 barrels if we used a certain kind of terra cotta for our flooring, and if we used concrete flooring the quantity would be very much larger, but how much larger I could not tell him. Therefore, I said to him, "I will not name 5,000 barrels, except you take it upon the understanding that it is to be more or less. If I want less than 5,000 barrels"—and I didn't expect but what I should want it—"it will be all right, but if it requires more, you must give me all I want."

Q. Are you positive, Mr. Gray that you discussed the question of concrete or tile floors with Mr. Baker at that conversation?

A. Of necessity I had to say that, if I said anything, and I think we discussed the question, I did not tell him anything particularly, of the form of construction of the building, except the specifications of materials.

The only question was the question of specification of material, class of material to be used—not the quantity of material to be used—I said nothing about the quantity except the 5,000 barrels, more or less, and I want to say right here that there was no mistake with Mr. Baker about this. I want that understood. That is a part of my telling the truth and the whole truth. Mr. Baker brought that letter (Plaintiff's Exhibit No. 1) officially to me, not personally, but officially, to me as his bid. He brought it to me personally and he gave it to me then and there on the same afternoon of the day that I had this conversation with him. I do not suppose he was gone more than an hour from the office. Then I told the architect of the fact of the contract, the bargain being made with Mr. Baker, and then I instructed the architect to order the cement from Mr. Baker, or, at least, from William Wolff & Company. I did not reply to this letter in any way, in writing, but I did verbally to Mr. Baker. I am now unable to say whether it was that day or the day following. I did not show any plans or specifications, or anything of that sort connected with this work, to Mr. Baker at the time he had this conversation with me. He saw none of the plans as far as I know. It was simply a question with him as to quantity. I understood that this cement was German cement. If I am not mistaken, he advised me that he had the cement on hand. Five thousand (5,000) barrels of cement even were furnished; 885 barrels we held out; that was the last installment, and we declined to pay for them on account of this breach of contract.

Mr. Vogelsang, in response to a question put by the Court, stated that the claim for the purchase price of the 885 barrels formed the basis of another suit in this court, namely: A mechanic's lien suit, which is not quite ready for trial and which was originally filed in the State court; but the demand is counterclaimed in the suit at bar. These two suits were brought almost at the same time, one in the State court and one in this court.

(The witness, continuing, testified as follows:) I do not recollect seeing Mr. Baker again on business until he came with Mr. Wolff to plead with me to pay for the eight hundred and odd barrels. He claimed that he fulfilled his contract, and I claimed that he had not fulfilled it. I denied that he had fulfilled it because he had not given me all the cement I required for the building. He had given me 5,000 barrels. I claimed that he should have furnished all the cement I required for the building, 5,000 barrels, more or less. He endeavored to ignore the more or less proposition.

Q. Did he say anything to you about in the case of a settlement of the proposition that he would make a small delivery to cover any question of "more or less" involved in the contract?

A. After we had completed our building, Mr. Baker came to me, or sent me a proposition that he would deliver me 500 barrels, and I said: "We are not dealing in cement; I have no use for it."

Q. Is that what you said, Mr. Gray? Are you sure that is the reply you made?

A. I am sure of it.

Q. May you not have said that you would not accept 500 barrels unless he would furnish it all; that you would not take 500?

A. No, sir; I did not any such thing.

Q. You did not? A. No, sir.

Q. What time was it that he spoke to you about the 500 barrels?

A. My recollection is that he spoke to me about the 500 barrels at some period after the visit of himself and Mr. Wolff, and it was after the building was completed. It was after I had purchased this 2,925 barrels and used it in addition to the 5,000. I cannot locate the time except that it was after the interview with himself and Mr. Wolff. Presumably, the architect's certificate that the 885 barrels had been used and accepted in the building was presented to me on July 27, 1898, as appears by the date of the certificate, and that was either a little before or a little after the time that we had the discussion with reference to the nonfulfillment of the contract; but the offer of Mr. Baker to let us have 500 barrels of cement was not at or about that time, but was very much later than that, very much later—months—a good many months. It was at some period long after that certificate of the architect was given.

On redirect examination, the witness testified: Before any proposition from Mr. Baker came in reference to the 500 barrels, the building was practically completed and all the cement used. I had no use for it, and that was my answer—that I could not use it. I got the extra cement from Henry Cowell. The 500 barrel proposition

only came after we had used all the cement we needed. At the time the first question arose about their furnishing any more than 5,000 barrels they did not then propose to give any more than 5,000 barrels. That was their ultimatum, that they had fulfilled their contract, and I disputed it. I told them that the reason why I did not pay for the last installment of cement was because they had not kept their agreement. I told them they had not kept their agreement because they had not delivered the amount of cement I required for the building. I stated as clearly as I could before that at the talk with Mr. Baker, the question with Mr. Baker and with me was as to the quantity, and I could not give him quantity. I told him I wanted the cement for the building, and the whole of the cement. The specifications were not completed at that time, determining the material that would be used, and it, therefore, made the question of quantity an unknown quantity. The plans were made, but the material was not decided on. After I got this letter of Wolff's (Plaintiff's Exhibit No. 1), I put that in the archives of the company in the company's vault, and there it has remained until yesterday. I was the specific officer in charge of this building business and directed it.

Mr. VOGELSANG.—Q. Let me ask you this question, Colonel Gray: These two certificates here for cement purchased of Henry Cowell and furnished by him, one dated September 6 and the other dated October 7. You mean to be understood as saying that the tender by Mr. Baker of 500 barrels in addition, to cover any deviation, or to cover the definition of "more or less," was made

to you after you had got these certificates—after you had got this cement?

A. After the cement was furnished?

Q. After this cement was furnished and after these dates?

A. I presume it was after these dates, but those certificates did not always come in exactly at the date of delivery of the cement, but usually they were very prompt.

Q. Usually they are when they want money?

A. Sometimes they differ. Sometimes I would not get it within fifteen or twenty days.

Q. Then these dates do not amount to much?

A. They don't amount to much. The point, as I stated before was, emphatically, that the 500 barrel tender was after I had used up all the cement I wanted in that building.

Counsel for the respective parties then stipulated that Wells, Fargo & Company, after the receipt of 5,000 barrels of cement from William Wolff & Company went into the open market and bought at a fair market price 2,925 barrels of cement, similar to that which was furnished by William Wolff & Company, and as nearly the same as they could get in the market at that time. That the prices given by the witness Gray were the true and correct prices, and that if plaintiff is entitled to judgment, a proper basis for computation of amount of damages is laid.

J. Y. AYER, a witness sworn on behalf of plaintiff, testified as follows:

I superintended the construction of a certain building erected by Wells, Fargo & Company at the corner of Second and Mission streets in this city, beginning in September, 1897, and completed, I believe, in the latter part of 1898. As such superintendent I received cement furnished by Wolff & Company and also by Mr. Cowell. Five thousand (5,000) barrels were furnished by Wolff & Company, and the last of those 5,000 barrels were delivered in May, 1898. I ordered the cement of William Wolff & Company as we needed it every day. The date of the last order that I gave was May 20, 1898, for 500 barrels; on May 20th, when I ordered the 500 barrels, there were 385 barrels delivered from that order, and then they stopped. The 385 barrels completed the entire lot of 5,000 barrels. They delivered that same day 200 barrels; on the 23d of May they delivered 50 barrels; and on the 26th they delivered 135 barrels, making 885 barrels for the month of May, and that made the 5,000 barrels. I ordered 500 barrels; on May 20th this order was not completed. It lacked 115 barrels. I called on May 27th, 1898, at the office of William Wolff & Company, to know if they were going to complete that order for 500 barrels. I think I saw Mr. Baker there. I am not sure whether it was Mr. Baker or Mr. Wolff, but I am sure it was one of them. I stated that I called to see if they were going to complete the order that I gave on May 20th for 500 barrels. They claimed that they had filled their contract and they would not furnish any more cement. I said I did not come there to argue that question. I said that I supposed that their contract was to furnish the cement

for the building, 5,000 barrels, more or less. They refused to furnish any more cement.

On cross-examination the witness testified: As superintendent of the building I sent in orders to William Wolff & Company for the cement as it was required, and the orders were filled, as I sent them in, up to 5,000 barrels. I had no other connection with the contract in any way. Colonel Gray was the person who officiated at the time of the original contract.

HENRY C. GEORGE, a witness sworn on behalf of plaintiff, testified:

I am manager of Henry Cowell, dealers in lime and cement, and have been manager for the past five years. In the year 1898, Henry Cowell & Company furnished cement to Wells, Fargo & Company, 2,925 barrels—it was for use in the new Wells, Fargo's building, Second and Mission streets, and was delivered there. The cement was furnished at the fair market price which prevailed at the time for the same; the larger portion at \$3.55, and a small portion at \$3.30 per barrel. The cement furnished by us and Alsen's German Portland Cement are both first-class German cements, and are about of the same quality.

On cross-examination the witness testified: The first delivery of the lot furnished by us was May 31, 1898, and the last delivery was made November 17, 1898. The statement from which I have refreshed my memory shows that the sale was made to Messrs. Percy and Hamilton. It was sold to Percy & Hamilton for Wells, Fargo & Company's building.

On redirect examination the witness testified:

Mr. SUTRO.—Q. Is it not the fact that it was sold through Percy & Hamilton to Wells, Fargo & Company?

A. Yes, sir.

The COURT.—Who are Percy & Hamilton?

Mr. SUTRO.—They are the architects, if your Honor please.

On recross-examination the witness testified:

Q. It was sold to Percy & Hamilton, was it not, and then, upon their order, delivered to the Wells, Fargo & Company's building?

Not on their order altogether. Mr. Ayer ordered it sometimes. I am not sure about it. I do not know of my own knowledge at what time this cement (the 2,925 barrels), was sold to Percy & Hamilton. I made the sale of this cement myself. I do not know whether it was on the same day that I made the first delivery. My impression is that Percy & Hamilton bought a large lot of 6,000 barrels some days prior to the first delivery of this cement to Wells, Fargo & Company, but I cannot tell whether this cement was any part of that 6,000 barrels. I suppose we have the contract on file. During the recess I examined the books of Henry Cowell & Company to see whether or not there was a contract with Percy & Hamilton for the furnishing of cement for Wells, Fargo's building, and I cannot find any contract at all. I find no contract at all with Percy for the furnishing of cement.

Witness identified the following receipt, which was introduced in evidence and marked "Plaintiff's Exhibit No.

Plaintiff's Exhibit No. 2.

Office of Percy & Hamilton, Architects, 532 Market street.

No. 136.

San Francisco, July 8, 1898.

Certificate to Wells, Fargo & Co.

This certifies that the sum of three thousand nine hundred and five dollars (\$3,905) is due Henry Cowell & Co. for work done as per terms of contract.

For 1100 bbls. Portland cement delivered at Express Bldg., at \$3.55 per bbl., this being the first payment on Germania cement. Total payment \$3905.00 on Germania cement contract.

PERCY & HAMILTON,

Architects.

Received the amount of the above certificate.

HENRY COWELL & CO.,

Contractor.

W. H. GEORGE.

(Paid Jul. 16, 1898. Wells, Fargo & Co. Bank, San Francisco, Cal.)

(Wells, Fargo & Co. Jas. S. Bunnell, Jul. 16, 1898. Cashier Express, San Francisco.)

(Approved. Geo. E. Gray, I. Y. Ayer.)

(Plaintiff's Exhibits Nos. 3, 4, and 5 are in the same form, except the dates and amounts are different.)

GEORGE W. PERCY, a witness sworn for the plaintiff, testified as follows:

I am an architect and built the building for Wells, Fargo & Company, located at the corner of Second and

Mission streets, this city. I bought of Henry Cowell & Company, in the name of the firm of which I was a member, a large quantity of cement, 6,000 barrels, of which at the time I knew a large portion would be wanted on Wells, Fargo & Company's building, and it was sent directly from Henry Cowell's to Wells, Fargo and Company and billed to them. The cement was in the first place sold by them to me, but on my instructions they sent nearly 3,000 barrels to Wells, Fargo & Company and billed it to them. The cement used by Wells, Fargo & Company was paid for directly by them to Cowell & Company.

On cross-examination the witness testified:

With reference to the time that the contract was let for the form of flooring finally adopted in the Wells, Fargo's building, which was in the last part of December, 1897, it was several months afterward—four months at least afterward—that I made this purchase of this 6,000 barrels of cement from Davis & Cowell. It must have been as late, I think, as April, and possibly, May, 1898, that I made that contract. I signed a written agreement for 6,000 barrels of Portland cement, to be delivered on my order at different times, and dealt with Mr. George, here, in making that contract. My talk and all the agreement was made with Mr. George. He thought they would rather have a written agreement, which I signed in the name of Percy & Hamilton. Mr. George asked for the written agreement. I gave Mr. Baker general instructions to deliver cement to the building on the order of the superintendent there, Mr. Ayer or Mr. Humphrey, both

of whom represented the owners, and the general instructions were to deliver cement whenever they called for it.

Q. Who advised you to give this order to Mr. Baker?

A. Colonel Gray.

Q. Did Colonel Gray show you the letter, the proposition made by William Wolff & Company through Mr. Baker to Wells, Fargo & Company?

A. It is very probable that he did, but I cannot remember positively whether he did or not. I know the price, and that was all I cared about.

On redirect examination the witness testified:

My impressions are, then, and I am quite clear on that, that I made this purchase before the formal demand was made for any more cement and before there was a positive refusal to furnish it, and before the 5,000 barrels had been exhausted.

HENRY C. GEORGE, previously sworn for plaintiff, was recalled for the plaintiff and testified:

I want to correct a statement made in reference to my having the contract, mentioned by Mr. Percy. I cannot find the contract.

The Court then directed Mr. Percy and Mr. George to look for the contract entered into by Mr. Percy, or Percy & Hamilton, for the purchase of the 6,000 barrels.

The plaintiff then rested.

Counsel for the defendant then and there in open court entered its motion for a nonsuit and for a rule of the Court granting the same against said plaintiff.

(a) Because the contract, as plead by the plaintiff, is

at variance with the contract proved, if they attempt to prove the contract by this parol testimony.

(b) Because there is no evidence before the Court that Messrs. William Wolff & Company have broken their contract, which was to supply 5,000 barrels of cement at \$2.56 per barrel.

(c) Because the evidence before the Court does not sustain the cause of action set forth in the complaint.

Said motion of defendant was then and there by the Court overruled and denied, and an exception was noted for the defendant and allowed by the Court. (Defendant's Exception No. 4.)

Thereupon ALEX. T. VOGELISANG, Esq., on behalf of the defendant, made an opening statement to the Court.

MARTIN BOZE, a witness sworn on behalf of defendant, testified:

I am employed by William Wolff & Company, and was in their employ in September, 1897. I recognize the letter which you show me (Plaintiff's Exhibit No. 1). I delivered that letter to Colonel Gray at his office in the old Wells, Fargo's building at or about September 4, 1897.

On cross-examination the witness testified:

I am positive this was the letter, because I copied it, and the stenographer enclosed it in a envelope and I took it up immediately.

WILLIAM WOLFF, sworn on behalf of defendant, testified:

I am the defendant in this action and am the plaintiff in the other action pending on the same subject matter.

I am the person referred to in the letter (referring to Plaintiff's Exhibit No. 1) as making the proposition to Wells Fargo & Company to furnish them certain cement. I made this proposition through Mr. Baker. I am in the importing and commission business at 329 Market street. At the time of this contract we were the local distributors for Alsen's cement, which is manufactured in Germany and comes here by sailing vessel.

Q. Are you a contractor to furnish cement work or are you simply a seller of the material, cement, itself?

A. We are selling agents for Portland cement. About the day this letter was written, Mr. Baker returned to the office and informed me of the sale that he had made to Wells, Fargo & Company. The sale this letter speaks of. When I was informed by Mr. Baker, I honored the orders of Wells, Fargo & Company for the delivery of cement up to 5,000 barrels.

Q. Did you set aside that amount of cement for them?

(Plaintiff's counsel objected to this question and stated that it made no difference whatever so far as any issue in the action was concerned. Counsel for defendant stated the question was proper in this respect; upon the theory that there may be an ambiguity in the writing, such an ambiguity is dissipated by the acts of the parties to the contract. If this witness states that upon the signing of that agreement and the report thereof to him, he immediately set aside, or reserved, 5,000 barrels, that is an act done by him right at the very inception, and it is conduct which would help the Court to understand the meaning which one of the parties put upon the contract.)

The COURT.—Then we would meet another difficulty. In the first place, what constitutes a setting aside? The setting aside would be the making of entry in his books at most, and the entry would be substantially—

Mr. BROWN (Interrupting).—We might change the words “setting aside” to “reserved.”

The COURT.—I will sustain the objection, to which ruling of the Court defendant noted an exception, which was then and there allowed by the Court. (Defendant’s Exception No. 5.)

(The witness then continued:) I saw Mr. Gray with reference to this contract about the middle of the month of June, 1898, for a settlement for the payment of the cement delivered, to wit: 885 barrels, the purchase price of which amounts to \$2,665.69. I called on Mr. Gray in company with Mr. Baker. We asked for the payment of the balance due on the cement supplied, and Mr. Gray maintained that we had not fulfilled our contract. Upon asking upon what grounds he based his assertion, he said that he had purchased all the cement that was required for the erection of the building. I referred to our letter, our written agreement, and asked him, whether he did not understand, that, according to that letter, we were obliged to deliver no more than 5,000 barrels and he said no, that was not his understanding. I said to him, that at the utmost he could not claim more, according to the commercial usage, that ten per cent of the amount stated in the letter, 5,000 barrels.

The COURT.—Q. You mean ten per cent additional?

A. “More or less,” your Honor.

Q. That "more or less" would be satisfied by ten per cent? A. Yes, sir.

On cross-examination, the witness testified:

We declined to deliver more than 5,000 barrels.

GEORGE W. PERCY, a witness already sworn, was recalled for the defendant and testified:

Wells, Fargo & Company's building was completed at the very last of the year, 1898, ready to be occupied in January, 1899. The last payment of cement was in November, 1898; the cement had been used sometime before that—within a month or so—prior to his departure for the east, Mr. Baker called upon me, and referred to the contract, in my office.

Q. What did he say about this at that time to you?

(Counsel for plaintiff objected to the question on the grounds of immateriality and irrelevancy. The Court permitted the witness to testify, subject to the right of counsel for plaintiff to move to have the answer stricken out.)

A. He told me he was going away to be gone some weeks; that he had caused the entire 5,000 barrels, that we should require at Wells, Fargo & Company's building, to be stored in the warehouse subject to our orders, and that it made no difference about his not being here, the orders would be filled just the same.

Mr. SUTRO.—I ask that this be stricken out. It is the same testimony that was sought to be elicited from Mr. Wolff yesterday, and your Honor ruled that it was immaterial.

And thereupon, the Court granted the motion to strike out the last answer of the witness, to which ruling defendant then and there excepted, and such exception was allowed by the Court. (Defendant's Exception No. 6.)

Witness Henry C. George thereupon returned and introduced the following agreement, as requested, and plaintiff thereupon introduced the said agreement entered into between the firm of Percy & Hamilton, of which the witness, Percy, was a member, and Henry Cowell & Company. It is headed:

"Henry Cowell & Company, Santa Cruz," etc. "Lime and Cements, 211-213 Drum Street. San Francisco, May 21, 1898."

And the body of the letter reads:

"Messrs. Percy & Hamilton,

Gentlemen: Referring to our conversation of this morning, we now confirm the sale of 5,000 barrels of Germania Cement to you at \$3.50, all to be taken within ninety days. Terms, cash on delivery.

PERCY & HAMILTON,

Buyer.

HENRY COWELL & CO.,

Seller.

June 15, 1898. We hereby confirm the sale of an additional 1,000 barrels on same terms as before.

PERCY & HAMILTON.

HENRY COWELL & CO."

Mr. EDMUND BAKER, a witness sworn for the defendant, testified: I am a resident of this city and county

and the Pacific Coast Agent of the Alsen Portland Cement Works, at Hamburg, Germany, and was such agent on or about the 24th day of September, 1897, and had been such agent for about four years at that time. The Alsen Portland Cement Works are in Germany and the cement is brought to California in sailing vessels. The local agency here for the cement was William Wolff & Co. I was engaged in selling cement in the State of California, as well as in other parts of the Pacific Coast. I made sales in San Francisco, through the business house of William Wolff & Company. I remember a transaction had on behalf of William Wolff & Company with Wells, Fargo & Company. It was in the month of September, 1897, the 24th day, as I recall it. I called on Mr. Percy of the firm of Percy and Hamilton, the architects for the new building for Wells, Fargo & Company, and told him I was under the impression, or that I knew that this building was to be erected and that a large quantity of Portland cement would be used. He told me yes, that he was the architect for the building, and that a quantity of Portland cement would be used, and that the purchase would be made by Wells, Fargo & Company direct. I called on Mr. John J. Valentine, who told me the question of the purchase of cement was in the hands of Col. Gray. I saw Colonel Gray at 3 o'clock on September 24, 1897, and introduced myself to him. I told him then that I heard they required some Portland cement. He said, "Yes." I asked him how much they would require. He said he would require 3,000 barrels, but possibly they might require 5,000 barrels. He first said 3,000 barrels,

but then he said they might require altogether 5,000 barrels. I gave him my price on 5,000 barrels of Alsen's Portland Cement, \$2.56 per barrel, which was very low then. He asked me to return to my office, or go and put that proposition in writing. I immediately returned to the office of William Wolff & Company, where I had a desk and where I made my headquarters and dictated to the typewriter the proposition made to Colonel Gray. I made the proposition on the basis of 5,000 barrels, of \$2.56 on 5,000 barrels. That was the conversation I had with Col. Gray. After writing that letter, I gave it to the boy who copied the letter and enclosed it in the envelope, and the boy took it to the office of Wells, Fargo & Company and delivered it by hand. The following day, or the day following that, I called on Mr. Percy. Mr. Percy had the letter that I had written to Col. Gray. It was lying on his desk beside him. He told me that if I wanted the order, Col. Gray had told him I should have it. I said very well, that I would supply the cement, according to the terms of my proposition. Prior to my going to Mr. Percy I had received no notification from Wells, Fargo & Company that they were asking for bids, or proposals, for the furnishing of cement. After writing this letter, I did not see Col. Gray until the controversy began. Col. Gray did not tell me, after the delivery of the letter, that my proposition was accepted. I did not see him. I learned of the acceptance from Mr. Percy. My transactions were all with Mr. Percy thereafter.

Q. What did you do after you were notified by Mr. Percy that they had accepted your proposal?

Mr. SUTRO.—I object on the ground that it is incompetent, irrelevant, and immaterial. "What did you do with reference to the contract," is too broad. It is merely tending to bring out the fact that I objected to.

Mr. VOGELSANG.—That is evidence of the fact, if your Honor please, that the understanding of the men at the time, months before any controversy arose, was different from what is now contended for. That would certainly, in our judgment, be good testimony as to what was intended by this contract. This is something that occurred at that particular time. It would show, as we state, exactly what his understanding was, and if it should turn out that there was really no contract, the inference would remain that it was, as we have counter-claimed it here, that goods were furnished to these people and used by them, for which they are bound to pay.

The COURT.—I do not think the testimony is relevant. The liability of these parties must be adjusted upon the contract. When that letter was written and delivered to Wells, Fargo & Co., and Mr. Baker was informed by Mr. Percy that his contract had been accepted the terms were made and that was the end of the transaction, so far as the liability of the parties was concerned.

Mr. BROWN.—If your Honor please, we agree that the contract is clear and free from all ambiguity. It seems that this is the view that your Honor takes of it now, but we have to meet the other side's theory, and, judging from the opening statement of Mr. Pillsbury, the theory on their side is that there may be some ambiguity. If

there is no ambiguity, your Honor would interpret it without any reference to outside circumstances, declarations or facts, for the purpose of construing the language of the instrument. But here we must meet their theory that is advanced already, and, it seems to us, in view of what your Honor has last said, that if, immediately upon the writing being delivered, this gentleman, after having been notified by the agent of the corporation in charge of the work, the managing agent, the architect, who has control of it all, that his proposition was accepted, goes to his place and reserves the amount that is set forth in that letter, that would tend to help the Court to remove any ambiguity, if there is any.

The COURT.—I think I can dispose of the controversy by a few questions.

In reply to questions propounded by the Court, the witness said:

I am the general agent of the Alsen Cement for the Pacific Coast, which includes California, Oregon, Washington, and Utah. All the cement for this particular section came through me. I ordered it and brought it by sailing vessel. The ordering of the cement was a matter of anticipation of several months—six months. As a rule, I did not wait for a contract in order to send for any cement. I kept a supply coming as any other person would, but at times it is very difficult to obtain it owing to a lack of cement in Europe. I endeavor to keep a supply of the cement on hand in San Francisco, in Portland, and Los Angeles and Seattle. That is, I have cement deposited in warehouses there. I have not always had that all the

time. When vessels are obtainable, I endeavor to keep a stock at those various points. It is not always possible to do so.

Mr. BROWN.—We desire to renew our question now.

The COURT.—I shall sustain the objection to the question (this refers to the question of Mr. Vogelsang) "What did you do after you were notified by Mr. Percy that they had accepted your proposition?" To this ruling of the Court defendant then and there excepted, and such exception was allowed. (Defendant's Exception No. 7.)

(The witness continuing:) I left for the east on December 12th, I think.

Q. What took place at that time? What did you say to Mr. Percy, and what did he say to you?

A. I called on Mr. Percy, as I usually did, before leaving town on my eastern trips, and in this instance, to inform him that I was holding the undelivered quantity of the 5,000 barrels for Wells, Fargo & Company, and he said very well, that was all right.

Mr. SUTRO.—I ask that that be stricken out on the ground that it is irrelevant and immaterial.

The COURT.—If the purpose of this is to prove that he understood the contract to provide for the delivery of 5,000 barrels I hold that it is irrelevant and immaterial, and I will strike it out.

And to this motion of plaintiff to strike out defendant objected, whereupon the Court ordered such answer stricken out, to which ruling of the Court defendant then

and there accepted and this exception was allowed. (Defendant's Exception No. 8.)

(The witness continuing, testified:) At the time that I called upon Mr. Gray he did not say anything to me about plans or specifications for the building, nor did he show me any, nor did I examine them.

Q. Did he tell you at that time, Mr. Baker, prior to the writing of this letter that he wished you to furnish at that price all of the cement that would be required for the building regardless of the number of barrels?

A. Five thousand barrels, he asked me to furnish. All I can say is that he requested me to give him a price on this quantity. There was no conversation between us as to the furnishing of an indefinite amount of cement. After the meeting, which resulted in the writing of this letter, I did not see him again, to have any business talk with him, until the following year when the controversy began, when I called with Mr. Wolff with the architect's certificate, dated July 27, 1898, requesting payment.

Defendant then introduced in evidence such architect's certificate, and the same was marked Defendant's Exhibit "A," and is in the following words: (Here insert Defendant's Exhibit "A.")

Defendant's Exhibit "A."

PERCY & HAMILTON,

Architects, Hobart Building, 532 Market Street, Telephone Main 5500.

San Francisco, Cal., July 27, 1898.

To Wells, Fargo & Co., San Francisco, Cal.

This is to certify that Wm. Wolff & Co., have furnished and delivered at the Express Bldg., corner of Second and Mission Sts., eight hundred and eighty-five (885) Bbs. of Alsen's Portland Cement since the date of last payment.

All of which was in good condition and has been used in the work.

PERCY & HAMILTON.

I called with Mr. Wolff on Mr. Gray with that certificate for the purpose of requesting payment for the last lot of cement. We had several times sent representatives of William Wolff & Company to collect this money, but had been unable to collect it, and we called on Col. Gray with the certificate, and Col. Gray refused to pay the bill, claiming that more cement was due him and he would hold this money on that account. I next saw Col. Gray, in reference to this contract, a few weeks later, in August. I think the last conversation I spoke of was the latter part of July. Yes, the certificate is dated July 27th. I saw him next, after the arrival of the ship "Pampa," which came in on the 4th of August, sometime while that vessel was discharging. I should say, sometime about the middle of August. On the "Pampa" was the

first cement that had arrived since April of that year, 1898. I had no arrival of cement in April. On the 15th of August, after the arrival of the ship "Pampa," I called on Mr. Gray and told him that I had an arrival of Alsen's Cement and that I would give him 500 barrels at the same rate as the 5,000 barrels I had supplied; that, although I did not feel that I was called upon to do so, at the same time rather than have any controversy at all with him, I would let him have 500 barrels. I stated to him that I had been advised by my attorney to do so. I remember when Mr. Ayer, an agent of Wells, Fargo & Company, called at the office and asked for an order for the 500 barrels of cement. I was present. A clerk of William Wolff & Company came into my office and told me a gentleman from Wells, Fargo & Company was there for an order for 500 barrels of cement; 385 barrels only were necessary to complete the 500 barrels. I told Mr. Ayer that all I had, or all William Wolff & Company had, were 385 barrels to complete his order and that was all we could give him; that we had no more cement and could give him no more. This was the 19th or 20th of May, 1897.

On cross-examination, the witness testified:

At the time of which we are speaking, William Wolff & Company were the California agents for Alsen's Portland Cement. It is necessary, in the course of my business, for me to find out by looking through the building papers—to discover what buildings are in progress of erection, or about to be erected, and to watch these building operations and to find who the architects are.

Q. You went to Mr. Percy just the same as you would in the first instance have gone to Wells, Fargo & Company, in answer to a proposal, did you not—that is, to put in a bid for the cement on that building?

A. I did not receive any notification.

Q. I say, it was just the same sort of proposition. You went to Mr. Percy to find out if you could not get a bid?

A. As Mr. Percy was architect for the building, I went to find out from him what quantity would be required, and when it would be required.

Q. You went there to find out if you could not make a bid for the building. Is that not the fact?

A. Yes, sir, I did.

Q. For the cement? A. Yes, sir.

Q. And it is just the same as if you had received a proposal from Wells, Fargo & Company, and had gone to Wells, Fargo & Company and made a bid?

A. Yes, sir.

Mr. VOGELSANG.—We object.

The COURT.—I sustain the objection.

Mr. SUTRO.—They asked him about his going to Mr. Percy, and I think this is proper cross-examination of his statement that Mr. Percy told him to go to Wells, Fargo & Company. I am saying that if he had received a proposal, he would have gone to Wells, Fargo & Company in the first instance.

The COURT.—If that is all you mean, that is all right. That is not very material one way or the other.

Mr. VOGELSANG.—I cannot see how he can tell whether under different circumstances he might have done something else.

The COURT.—Well, it is in.

(The witness continuing, testified:)

Colonel Gray said at first 3,000 barrels would be required for the building; that he might possibly want more, and specified from three to five thousand barrels. At first he said 3,000, and afterwards he said he might require an amount that would equal 5,000. Colonel Gray told me they would need 5,000 barrels and did not say anything to me with reference to the floors of the building. He did not tell me that the material for the floors had not been decided upon. He did not mention to me that they might even use terra cotta or cinder concrete. I have no recollection of anything of the kind. He said nothing of the kind, at all.

Q. May he have said it?

A. I think not, sir, because we had very few minutes of conversation and I doubt very much if he had time to say it. When Mr. Ayer called on me on the 20th of May, 1897, he asked me to deliver 500 barrels of cement to Wells, Fargo & Company. I refused to deliver 500 barrels. I refused to deliver 115 barrels but not 500 barrels, because I had 385 barrels. I refused to deliver the full quantity of 500 barrels. When I first went to Mr. Percy, he did make a suggestion to me as to about how much cement would be required in that building; he said about 3,000 barrels. It was in August, 1898, at the time that I

went to see Col. Gray, that I got the advice of counsel that I could deliver 500 barrels more.

Mr. VOGELSANG.—Q. And that was the first time since April that you had any cement?

Mr. SUTRO.—I object to that question.

The COURT.—The Court has a suspicion from what had already been brought out that they had no cement before August.

Mr. SUTRO.—He testified that he went to Colonel Gray under the advice of counsel.

The COURT.—It is always a mistake to go upon the theory that the Court will be guided by the technical rules applying to the subject matter. Substantial justice is what the Court must determine, without regard to these technical matters.

Mr. SUTRO.—That is all, your Honor, except there is one other matter to which I would like to refer, and that is this: Mr. Wolff, in the answer which he has corrected, said, after the portion corrected: "I said to him that at the utmost he could not claim more, according to the commercial usage, than ten per cent of the amount stated in the letter, 5,000 barrels." If that is to be construed as in any way a statement of custom, I would like to put in rebuttal testimony.

The COURT.—The Court will not proceed upon that theory.

Mr. SUTRO.—Very well. Then that is the case.

The foregoing constitutes all the testimony taken, all

the admissions of fact made and the whole evidence upon the trial of the above-entitled cause.

The cause was thereupon argued by the respective parties counsel and submitted to the Court; whereupon the Court rendered judgment in favor of the plaintiff for the sum of six hundred and ten and 40-100 dollars (\$610.40) and costs of suit, and ordered findings in accordance therewith.

Thereupon the following findings of fact and decisions were duly signed and filed:

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

WELLS, FARGO & COMPANY (a Corporation),

Plaintiff,

vs.

WILLIAM WOLFF.

Defendant.

No. 12,711.

Decision,

This cause came on regularly for trial on the 13th, 14th, and 15th days of November, 1900, before the Court sitting without a jury, a jury having been expressly waived by written stipulation of the parties duly signed and filed, Mr. E. S. Pillsbury and Mr. Alfred Sutro appearing for the plaintiff and Mr. Alex. T. Vogelsang and Mr. I. I. Brown appearing for the defendant. Evidence, both oral and documentary, was introduced, and certain admissions of fact

were made, by and on behalf of the respective parties, and thereupon the cause was submitted to the Court for its decision, and now the Court being fully advised in the premises, and after having fully considered the said evidence and the said admissions, makes the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT.

I.

On or about the 24th day of September, 1897, the defendant, at the city and county of San Francisco, State of California, contracted to sell to the plaintiff as much Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building which the plaintiff was at that time about to erect in the said city and county of San Francisco, at the rate of \$2.56 per barrel. The amount of cement so contracted to be sold was not restricted to any particular number of barrels. It is not true that at said time the defendant and the plaintiff contracted for the sale of five thousand (5,000) barrels of said cement delivered at the building site of said building in the said city and county of San Francisco for the price of two and 56-100 dollars (\$2.56) per barrel. It is not true that the defendant on his part performed all of the terms and conditions of the contract which the Court finds was made with the plaintiff for the sale of said cement.

II.

The plaintiff was required and was compelled to use seven thousand nine hundred and twenty-five (7,925) barrels of cement in the construction of said building.

III.

The defendant delivered to the plaintiff, for use in the construction of said building, at the site of said building, five thousand barrels of Alsen's German Portland Cement at \$2.56 per barrel. The plaintiff required and was compelled to use in the construction of said building, 2,925 barrels of cement in addition to the said 5,000 barrels delivered to it by the defendant. The plaintiff requested the defendant to deliver to it the cement which it was so required and compelled to use in excess of said 5,000 barrels, at the said rate of \$2.56 per barrel, for use in the construction of said building, pursuant to the terms of said contract, but the defendant wholly failed, neglected, and refused to deliver to the plaintiff any more than the said 5,000 barrels under said contract.

IV.

By reason of the failure, neglect, and refusal of the defendant to furnish or deliver said 2,925 barrels of cement to the plaintiff, the plaintiff has been damaged in the sum of \$2,876, without interest.

V.

With respect to the issues made by the allegations of the first counterclaim set up in the answer of the defendant, the Court finds that the allegations of paragraphs I,

II. and III thereof are true. It is not true that on the 24th day of September, 1897, the plaintiff contracted to purchase of the defendant, and the defendant contracted to sell to the plaintiff, at the rate of two and 56-100 dollars (§2.56) per barrel, at the site of the said building of the plaintiff in the said city and county of San Francisco, five thousand (5,000) barrels of Alsen's German Portland Cement, but in this behalf the Court finds the facts to be as in finding I hereof stated. It is true that pursuant to the terms of the contract in finding I hereof stated to have been made between the plaintiff and the defendant, but not otherwise, the defendant sold and delivered and the plaintiff purchased five thousand (5,000) barrels of said cement at the rate of two and 56-100 dollars (§2.56) per barrel, and the plaintiff before the commencement of this action became indebted to the defendant therefor in the sum of \$12,800 in United States gold coin. Of said sum of \$12,800, no part has been paid saving and excepting the sum of \$10,534.40 on account thereof, and there is due and payable to defendant from the plaintiff for said cement so sold and delivered the sum of \$2,265.60, without interest.

Vl.

With respect to the issues made by the allegations of the second counterclaim set up in the answer of the defendant, the Court finds that the plaintiff is indebted to the defendant in the sum of \$2,265.60, as in finding V hereof stated, for 885 barrels of Alsen's German Portland Cement sold and delivered by the defendant to the

plaintiff, and being a part of the 5,000 barrels in findings III and V hereof stated to have been sold and delivered by the defendant to the plaintiff.

And from the foregoing facts the Court finds the following

CONCLUSIONS OF LAW.

That plaintiff is entitled to judgment against the defendant for the sum of \$2,876, less the sum of \$2,265.60, that is to say, the plaintiff is entitled to judgment against the defendant for the sum of \$610.40 and for its costs.

San Francisco, November 20th. 1900.

WM. W. MORROW,

Judge.

And in due time, defendant reserved his exceptions separately to finding 1, finding 3, finding 4, finding 5, and the conclusion of law in such findings and decision contained, and each and all of such exceptions were then and there allowed by the Court. (Defendant's Exception No. 9.)

And now in the furtherance of justice and that right may be done, defendant presents the foregoing as his bill of exceptions in this case and also as his statement of the evidence, and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

VOGELSANG & BROWN,

Attorneys for Defendant.

Plaintiff's proposed and allowed amendments having been engrossed in the foregoing bill of exceptions and statement of the evidence:

It is hereby stipulated that the same is correct, and that it may be allowed by the Judge, as correct.

Dated April 16th, 1901.

E. S. PILLSBURY,
ALFRED SUTRO,
Attorneys for Plaintiff.

The foregoing bill of exceptions and statement of the evidence having embodied plaintiff's proposed and allowed amendments, and the same being correct, I do hereby allow the same as the engrossed bill of exceptions and statement of the evidence in the above-entitled cause.

Dated this 17th day of April, 1901.

WM. W. MORROW,
Judge.

[Endorsed]: Filed April 17, 1901. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Northern District
of California, Ninth Circuit.*

WELLS, FARGO & COMPANY (a Corporation),	} Plaintiff,
vs.	
WILLIAM WOLFF.	

Petition of Defendant for an Order Allowing a Writ of Error.

William Wolff, the defendant in the above-entitled action, being aggrieved by the decision of the Court and the judgment entered in said action on the 20th day of November, 1900, in pursuance of said decision, whereby it was adjudged that the plaintiff do have and recover the sum of six hundred and ten and 40-100 dollars (\$610.40) damages and his costs in said action, comes now by Messrs. Vogelsang & Brown, his attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, on the ground set forth in the assignment of errors annexed hereto; and also for an order fixing the amount of security, which said defendant shall give upon said writ of error, and directing that upon the giving of such security, further proceedings be

stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

And your petitioner will ever pray.

VOGELSANG & BROWN,
Attorneys for Defendant.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM WOLFF,	}
Plaintiff in Error.	
vs.	}
WELLS, FARGO & COMPANY (a Cor-	
poration),	
Defendant in Error.	}

Assignment of Errors.

Now comes William Wolff, the plaintiff in error herein, by Messrs. Vogelsang & Brown, his attorneys, and specifies the following as the errors upon which he will rely and will urge upon his writ of error in the above-entitled cause.

I.

That the United States Circuit Court for the Northern District of California erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness, George E. Gray:

“Q. State what your conversation was with Mr. Baker.” And in admitting in evidence the answer of witness in substance: “The question Mr. Baker desired

was, that I would define accurately, some number of barrels of cement that we would want. I told him I wanted his proposition for the cement for that building, and I could not give him a positive quantity; that the architect said that under certain conditions, he would require about five thousand (5,000) barrels. That is what I told Mr. Baker; that if certain other conditions existed, it would take a great deal more. On that statement to Mr. Baker, he left my office and went back to the office on Market street, as he said, and came back to me again with a written proposition which is embodied in this letter, which I recognize, and that letter was received."

II.

That the said Circuit Court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness, George E. Gray:

"Q. Before offering that, Colonel Gray, I will ask you, what, if anything, you told Mr. Baker, preliminarily, you contemplated doing with reference to a building, and why you were getting these bids?"

And in admitting in evidence the answer of witness in substance: "I told Mr. Baker my object was to get cement for the building, the total amount of cement we required."

III.

That the said Court erred in overruling and denying the motion made by counsel for the plaintiff in error, after the introduction in evidence "Plaintiff's Exhibit No. 1," to strike out the conversations between the witness,

George E. Gray, and Edmund Baker, prior to the said letter, upon the following grounds:

(a) That the said writing, to wit, "Plaintiff's Exhibit No. 1," is clear and unambiguous and speaks for itself.

(b) All prior negotiations and conversations must be deemed to be merged in the said writing.

(c) The parol testimony offered and in evidence modifies *the changes the* said writing and agreement.

The objectionable part of said conversations is in substance, the answers set forth in assignments II and III.

IV.

The said Court erred in overruling and denying the motion of counsel for plaintiff in error for a nonsuit made at the point during the trial of said cause, when counsel for defendant in error announced for the defendant in error, a rest as to all its evidence.

V.

That the said Court erred in refusing to permit the witness, William Wolff, to answer the following questions, asked by counsel for plaintiff in error:

"Q. Did you set aside that amount of cement for them, or did you reserve that amount of cement for them?"

And in not permitting the witness to answer that he reserved five thousand (5,000) barrels.

VI.

That the said Court erred in granting the motion made by counsel for defendant in error to strike out the following answer of witness, George W. Percy:

“A. He told me he was going away to be gone some weeks; that he had caused the entire five thousand (5,000) barrels that we should require at the Wells, Fargo & Company’s building, to be stored in the warehouse, subject to our orders.”

VII.

That the said Court erred in refusing to permit the witness, Edmund Baker, to answer the following question asked by counsel for plaintiff in error:

“A. What did you do after you were notified by Mr. Percy that they had accepted your proposal?”

And in not permitting the witness to answer that he immediately reserved five thousand (5,000) barrels.

VIII.

That the said Court erred in granting the motion of counsel for defendant in error to strike out the following answer of the witness, Edmund Baker:

“A. I called on Mr. Percy, as I usually did before leaving town on my eastern trips and in this instance, and informed him that I was holding the undelivered quantity of 5,000 barrels for Wells, Fargo & Company, and he said, very well, that was all right.”

IX.

That the said Court erred in finding that on or about the 24th day of September, 1897, the defendant, at the city and county of San Francisco, State of California, contracted to sell to the plaintiff as much of Alsen’s German Portland Cement as the plaintiff should require for use in the construction of a building which the plaintiff

was at that time about to erect in said city and county of San Francisco, at the rate of two and 56-109 dollars (\$2.56) per barrel, because there is no evidence to justify the same.

X.

That the said Court erred in finding that the amount of cement, so contracted to be sold, was not restricted to any particular number of barrels, because there is no evidence to justify the same.

XI.

That the said Court erred in finding that it is not true that at said time the defendant and the plaintiff contracted for the sale of 5,000 barrels of said cement delivered at the building site of said building in said city and county of San Francisco for the price of two and 56-100 dollars (\$2.56) per barrel, because there is no evidence to justify the same.

XII.

That the said Court erred in finding that it is not true that the defendant on his part performed all of the terms and conditions of the contract, which the Court finds was made with the plaintiff, for the sale of said cement; because there is no evidence to justify the same; on the contrary, the evidence proves without conflict, that the said defendant, on his part, performed all of the terms and conditions of the contract which was made with the plaintiff for the sale of said cement.

XIII.

That the said Court erred in finding that on or about the 24th day of September, 1897, the defendant at the city and county of San Francisco, State of California, contracted to sell to the plaintiff as much Alsen's German Portland Cement as the plaintiff should require for use in the construction of a building which the plaintiff was at that time about to erect in the said city and county of San Francisco, at the rate of \$2.56 per barrel. The amount of cement so contracted to be sold was not restricted to any particular number of barrels. It is not true that at said time the defendant and the plaintiff contracted for the sale of five thousand (5,000) barrels of said cement delivered at the building site of said building in the said city and county of San Francisco for the price of two and 56-100 dollars (\$2.56) per barrel. It is not true that the defendant on his part performed all of the terms and conditions of the contract which the Court finds was made with the plaintiff for the sale of said cement, because there is no evidence to justify the same.

XIV.

The Court erred in finding that the plaintiff requested the defendant to deliver to it the cement which it was so required and compelled to use in excess of said five thousand (5,000) barrels at the said rate of two and 56-100 dollars (\$2.56) per barrel for use in the construction of said building, pursuant to the terms of said contract, but defendant wholly failed, neglected, and refused to

deliver to the plaintiff any more than the said 5,000 barrels under said contract, because there is no evidence to justify the same.

XV.

That the said Court erred in the finding set forth as paragraph three (3) of the findings of fact herein, on the ground that there is no evidence to justify the same.

XVI.

That the said Court erred in finding that by reason of the failure, neglect, and refusal of the defendant to furnish or deliver said 2,925 barrels of cement to the plaintiff, the plaintiff has been damaged in the sum of two thousand eight hundred and seventy-six dollars (\$2,876) without interest because there is no evidence to justify the same.

XVII.

That the said Court erred in finding that it is not true on the 24th day of September, 1897, plaintiff contracted to purchase of the defendant, and the defendant contracted to sell to the plaintiff at the rate of two and 56-100 dollars (\$2.56) per barrel, at the site of the said building of the plaintiff in said city and county of San Francisco, 5,000 barrels of Alsen's German Portland Cement, on the ground that there is no evidence to justify the same.

XVIII.

That the said Court erred in its conclusion of law that the plaintiff is entitled to judgment against the defendant for the sum of two thousand eight hundred and seventy-six (\$2,876) dollars, less the sum of two thousand two hundred and sixty-five and 60-100 dollars (\$2,265.60), that is to say, the plaintiff is entitled to judgment against the defendant for the sum of six hundred and ten and 40-100 dollars (\$610.40), and for its costs.

XIX.

That the said Court erred in its conclusion of law that plaintiff is entitled to judgment against defendant for the sum of six hundred and ten and 40-100 dollars (\$610.40).

VOGELSANG & BROWN,

Attorneys for Plaintiff in Error and Defendant.

[Endorsed]: Receipt of a copy of the within petition for writ of error and assignment of error and due service of the same is hereby admitted December 20th, 1900.

E. S. PILLSBURY,

ALFRED SUTRO,

Attorneys for Plaintiff and Defendant in Error.

Filed December 21, 1900. Southard Hoffman, Clerk.

By W. B. Beazley, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1900, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Friday, the 21st day of December in the year of our Lord one thousand nine hundred. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

WELLS, FARGO and COMPANY (a Corporation), vs. WILLIAM WOLFF.	}	No. 12,711.
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Order Allowing Writ of Error and Fixing Amount of Bond.

Upon motion of L. I. Brown, Esq., attorney for defendant, and on consideration of a petition of said defendant for an order allowing a writ of error to have the judgment of this Court herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and of an assignment of errors filed herein this day, it is ordered that said defendant be, and hereby is, allowed to prosecute a writ of error to have the judgment of this Court herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and it is ordered that the amount of the bond to be given by said defendant upon said writ of error (supersedeas and for costs) be, and hereby is, fixed at the sum of \$1,500.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

WELLS, FARGO AND COMPANY (a Corporation),	} Plaintiff,	No. 12,711.
vs.		
WILLIAM WOLFF.	} Defendant.	

Bond on Writ of Error.

Know all men by these presents, that we, William Wolff, as principal, and R. H. Swayne and J. G. Hoyt, as sureties are held and firmly bound unto Wells, Fargo and Company (a corporation) in the full and just sum of fifteen hundred (\$1500) dollars, to be paid to the said Wells, Fargo and Company (a corporation), their attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 22d day of December, in the year of our Lord one thousand nine hundred.

Whereas, lately at a session of the Circuit Court of the United States, for the Northern District of California, in a suit depending in said Court, between said Wells,

Fargo and Company, as plaintiff and said William Wolff as defendant, a judgment was rendered against the said defendant, and the said William Wolff, having obtained from said Court a writ of error to reverse the judgment in the aforesaid cause, and a citation directed to the said Wells, Fargo and Company (a corporation) is about to be issued, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 19th day of January next:

Now, the condition of the above obligation is such, that if the said William Wolff shall prosecute said writ of error to effect, and shall answer all damages and costs that shall be awarded against him if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM WOLFF. [Seal]

R. H. SWAYNE. [Seal]

J. G. HOYT. [Seal]

Signed and sealed in the presence of:

W. B. BEATZLEY.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

R. H. Swayne and J. G. Hoyt, being duly sworn, each for himself, deposes and says that he is a householder in said District, and is worth the sum of fifteen hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

R. H. SWAYNE.

J. G. HOYT.

Subscribed and sworn to before me this 22d day of December, A. D. 1900.

[Seal] W. B. BEAIZLEY,
Deputy Clerk United States Circuit Court, Northern District of California.

[Endorsed]: Form of bond and sufficiency of securities approved.

WILLIAM W. MORROW,
Judge.

Filed December 22, 1900. Southard Hoffman, Clerk.
By W. B. Beaizley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

WELLS, FARGO AND COMPANY (a Corporation),	Plaintiff,	} No. 12,711.
vs.		
WILLIAM WOLFF.	Defendant.	

Certificate to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing written pages, numbered from 1 to 68, inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$42.95, and that said amount was paid by William Wolff, defendant and plaintiff in error.

In testimony whereof, I have hereunto set my hand,

and affixed the seal of said Circuit Court, this 26th day of April, A. D. 1901.

[Seal]

SOUTHARD HOFFMAN,

Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

By W. B. Beazley,

Deputy Clerk.

[Ten Cent U. S. Int. Rev. Stamp. Canceled.]

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between William Wolff, plaintiff in error, and Wells, Fargo and Company (a corporation), defendant in error, a manifest error hath happened, to the great damage of the said William Wolff, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if

judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 19th day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 22d day of December, in the year of our Lord one thousand nine hundred.

[Seal]

SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

By W. B. Beazley,

Deputy Clerk.

Allowed by:

WML W. MORROW,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 22d day of December, 1900.

E. S. PILLSBURY,
ALFRED SUTRO,

Attorneys for Defendant in Error and Plaintiff.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of the said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

[Endorsed]: No. 12,711. Circuit Court of the United States, Ninth Circuit, Northern District of California. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Co. (a corporation), Defendant in Error. Writ of Error. Filed December 22, 1900. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA—*vs.*

The President of the United States, to Wells, Fargo and Company (a Corporation), Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 19th day of January next, pursuant to a writ of error in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action, numbered 12,711, wherein William Wolff is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this 22d day of December, A. D. 1900.

WM. W. MORROW,

Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this 22d day of December, 1900.

E. S. PILLSBURY,

ALFRED SUTRO,

Attorneys for Defendant in Error and Plaintiff.

[Endorsed]: No. 12,711. Circuit Court of the United States, Ninth Circuit, Northern District of California. William Wolff, Plaintiff in Error, vs. Wells, Fargo & Co. (a Corporation), Defendant in Error. Citation. Filed December 22, 1900. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

[Endorsed]: No. 698. In the United States Circuit Court of Appeals for the Ninth Circuit. William Wolff, Plaintiff in Error, vs. Wells, Fargo and Company, a Corporation, Defendant in Error. Transcript of Record. In Error to the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

Filed April 30, 1901.

F. D. MONCKTON,
Clerk.

